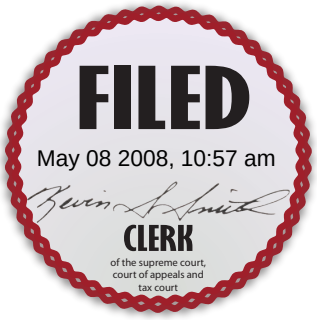

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IN THE
COURT OF APPEALS OF INDIANA

KWASI BARNES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0711-CR-620
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No.71D03-0601-FA-4

May 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Kwasi Barnes appeals his conviction of battery resulting in death, a Class A felony. Barnes raises three issues, which we restate as whether the trial court abused its discretion in denying Barnes's motion for a mistrial; whether sufficient evidence supports his conviction; and whether his sentence is inappropriate given the nature of the offense and his character. Concluding the trial court acted within its discretion in denying Barnes's motion for a mistrial, sufficient evidence supports his conviction, and his sentence is not inappropriate, we affirm.

Facts and Procedural History

On October 21, 2005, Shnikkia Jackson dropped off her four children, the oldest being five years old and the youngest, Deneja, being fifteen months old, at daycare. Shnikkia's father, Jimmy Jackson, picked up the children around 4:00 pm and took them to his house, where he fed them dinner. Jimmy then took the children to the home of another one of his daughters, Tisha Jackson, whom Barnes was dating and living with at the time. Tisha was not home from work yet, and Barnes agreed to watch the children. Barnes's cousin, Brandy Barnes, was also at the apartment. Jimmy testified that when he left the children with Barnes, Deneja was sleeping and that she "looked normal," was not bleeding, and had no bruises. Transcript at 372. Brandy also testified that she saw no marks on Deneja, and saw no blood on her or on Jimmy. Jimmy gave Deneja to Barnes, who took Deneja into the bedroom and put her on the bed. Brandy left the apartment roughly a half hour later.

Approximately five minutes after Brandy left the apartment, Barnes called 911 and

stated that Deneja was not responsive and was bleeding out of her ears. James Burns, a Corporal with the South Bend Police Department, was the first officer to arrive on the scene. Officer Burns testified that he entered the bedroom and saw Deneja laying facedown on the bed and that there was a lot of blood on the bed around her head. Deneja was taken to the hospital, where she was eventually declared brain dead.

Two doctors testified in regard to the injuries suffered by Deneja. Doctor Robert Yount was working at the hospital when Deneja arrived. He testified that when he first observed Deneja, "[t]he most obvious and stunning thing [was] blood and brains coming out of the child's ear." Tr. at 275. He described her injuries as "a severe head injury involving a blow to the head severe enough to cause significant extensive skull fractures, swelling of the brain, bleeding in the brain and on the surface of the brain, swelling severe enough that probably within a few minutes the flow of blood to the brain was stopped thereby rendering her brain dead." Id. at 282. He stated that "[i]t takes an enormous force to fracture a skull and cause those kinds of injuries. Again, child abuse aside, most of the time we see these types of injuries in high speed motor vehicle accidents." Id. at 284. Based on his observations, Dr. Yount testified that the cause of Deneja's injuries was "[s]evere nonaccidental trauma to the head." Id. at 306.

Doctor Joseph Prahlow, a forensic pathologist,[1] also testified regarding Deneja's injuries. He stated that "[s]he had several distinct skull fractures," id. at 121, that were caused by "a significant amount of force," id. at 126. He also stated that "the combination

with the injuries on the front of the face, the forehead, the eyes, the nose, . . . that means to me that there were at least three impact sites on this scalp." Id. at 128. He testified that he determined the death to be a homicide, or nonaccidental death, and that her injuries were consistent with either "someone slamming her head against a blunt object," or "a fist," but were not consistent with "falling off the bed." Id. at 141. He did allow that the injuries could conceivably have been caused by "someone falling on her," but that "that scenario [w]as stretching it a bit." Id. at 142.

Officer Thomas Cameron, of the South Bend Police Department, was involved with the crime scene investigation. He testified that he found no blood on the jacket Deneja was wearing when Jimmy left her with Barnes. Id. at 437. Officer Cameron secured a search warrant and processed Jimmy's vehicle, finding neither that the vehicle had been in a recent wreck nor traces of blood in the vehicle. He processed the clothing worn by Jimmy and Barnes the night of Deneja's death, and found blood on neither of their clothes. He also searched the areas surrounding Tisha's apartment and found no traces of blood.

On January 17, 2006, the State charged Barnes with battery resulting in death. On July 30, 2007, Barnes's jury trial began. At his trial, the medical experts and police officers testified to the facts as stated above. Barnes took the stand and denied harming Deneja in any way.

The State also called Mario Stewart, who was acquainted with Barnes and claimed to have spoken with Barnes in the county jail while Barnes was awaiting trial on the instant

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[1] Forensic pathologists "specialize in examination of dead bodies, and . . . in investigating sudden

charge and Stewart was incarcerated on firearm charges. During Stewart's testimony, the following exchange took place:

> Q: While you were there, did you speak with Mr. Barnes?
> A: Yes.
> Q: Did he tell you why he was there?
> A: Yes.
> Q: What did he say?
> A: He said murder.
> Q: Did he tell you anything about the charges and/or what happened?
> A: He just basically said that he messed up because it resulted into a death of a child.
> Q: Did he tell you how he messed up?
> A: Yes.
> Q: What did he say?
> A: Well, he indicated that the child was dropped off to him, and he was getting high. The baby was irritating his high by crying, and he said he was fed up with it so he just tossed the baby.
> Q: Did he tell you where he tossed the baby?
> A: He said he attempted to toss the baby on the bed but the baby totally missed the bed.
> Q: Did he tell you what the baby hit?
> A: The floor.
> Q: Did he tell you anything else about what happened?
> A: He just basically said that he thinks he's gonna get not guilty on the case.
> Q: Did he tell you why?
> A: He said there was similar accusations before, and he never was confronted by them –

Tr. at 496. At this point, Barnes's counsel moved for a mistrial. The trial court acknowledged that this statement regarding possible previous conduct was prejudicial, but declined to find prosecutorial misconduct. The trial court addressed the jury and told them to disregard Stewart's statement suggesting previous conduct and told them "there's absolutely no evidence, there's no record, there's no evidence whatsoever that the defendant was ever

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unexpected or violent death. As part of that examination [they] perform forensic autopsies." Tr. at 87.

charged with or any complaint made against him of anything of this nature that he's sitting here for." Id. at 506. He also asked the jurors if "anybody here feels that you can't be fair to both sides now? Be fair to the State, and be fair to the defendant." Id. Apparently satisfied that his instruction had cured the prejudice, the trial court declined to declare a mistrial.

On August 2, 2007, the jury returned a guilty verdict. On September 11, 2007, the trial court held a sentencing hearing and sentenced Barnes to forty-eight years executed. Barnes now appeals his conviction and sentence.

Discussion and Decision

I. Denial of Motion for Mistrial

"A mistrial is an extreme remedy that is warranted only when less severe remedies will not satisfactorily correct the error." Warren v. State, 725 N.E.2d 828, 833 (Ind. 2000). "A decision regarding a motion for mistrial is within the trial court's discretion, and we will reverse only when the defendant establishes that the trial court abused this discretion." Smith v. State, 872 N.E.2d 169, 175 (Ind. Ct. App. 2007), trans. denied. "In determining whether a mistrial is warranted, we consider whether the defendant was placed in a position of grave peril to which he should not have been subjected; the gravity of the peril is determined by the probable persuasive effect on the jury's decision." Leach v. State, 699 N.E.2d 641, 644 (Ind. 1998). If we conclude that "the jury's verdict is supported by independent evidence of guilt such that we are satisfied that there was no substantial likelihood that the evidence in question played a part in the defendant's conviction, any error in admission of prior criminal history may be harmless." Id. (quoting James v. State, 613 N.E.2d 15, 22 (Ind. 1993)).

Initially, we note that Barnes describes Stewart's improper[2] testimony as an "evidentiary harpoon." Appellant's Br. at 2. "An evidentiary harpoon is the placing of inadmissible evidence before the jury with the deliberate purpose of prejudicing the jurors against the defendant." Kirby v. State, 774 N.E.2d 523, 535 (Ind. Ct. App. 2002), trans. denied. However, no evidence indicates that the State intentionally elicited this testimony from Stewart. It is apparent from the line of questioning that the prosecutor's primary goal was to elicit testimony from Stewart regarding Barnes's admission to harming Deneja. The prosecutor told the trial court that he did not know that Stewart would testify regarding the prior accusation or that Barnes's statement regarding his past conduct had been part of the conversation between Stewart and Barnes. Further, both Barnes's counsel and the trial court indicated that they did not believe the prosecutor intentionally elicited this testimony. See Tr. at 496 (Barnes's counsel stating "I don't believe this was intentional"); id. at 499 (trial court stating "I don't find prosecutorial misconduct here"). We agree with their assessment and conclude the record does not support a finding that the State intentionally elicited the improper testimony. See Smith, 872 N.E.2d at 175 (declining to find prosecutorial misconduct where the prosecutor stated at trial that he had not intended to elicit the improper testimony).

Despite Barnes's characterization of Stewart's testimony as a "well delivered harpoon" that "references another hellish tale," appellant's br. at 3, we note that Stewart's

[2] Although Barnes does not explain why this testimony was improper, we assume that Barnes claims that this testimony was inadmissible under Indiana Evidence Rule 404(b), which states: "Evidence of other

statement that Barnes "said there was similar accusations before," is not a clear allegation of prior misconduct. See Tompkins v. State, 669 N.E.2d 394, 399 (Ind. 1996) (recognizing that the trial court could have determined that a witness's statement did not clearly inform the jury that the defendant had a criminal history); Smith, 872 N.E.2d at 175 (noting that the witness's statement that her son "was in YCC and [the defendant] was in YCC too," "does not unambiguously inform the jury that [the defendant] had a criminal history").

Also, "where a jury's verdict is supported by independent evidence of guilt such that we are satisfied that there was no substantial likelihood that the evidence in question played a part in the defendant's conviction, any error in admission of prior criminal history may be harmless." Boney v. State, 880 N.E.2d 279, 292 (Ind. Ct. App. 2008) (quoting James v. State, 613 N.E.2d 15, 22 (Ind. 1993)). The State relied primarily on medical testimony and circumstantial evidence indicating that Barnes was left alone with a healthy baby, who shortly thereafter had massive injuries. We conclude the probable impact of Stewart's brief reference to "similar accusations" was minimal. See Smith, 872 N.E.2d at 176 (concluding the trial court properly denied motion for a mistrial based on a witness's "brief reference to [the defendant's] time spent in [a youth detention center]"); Burks v. State, 838 N.E.2d 510, 520 (Ind. Ct. App. 2005) (concluding testimony regarding another crime committed by the defendant "was sufficiently minor as not to affect [the defendant's] substantial rights"), trans. denied; Conner v. State, 613 N.E.2d 484, 493 (Ind. Ct. App. 1993) ("The reference to the collateral criminal conduct was vague, made in passing, and could not have left a serious

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crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

impression upon the jury."), aff'd in relevant part, 626 N.E.2d 803 (Ind. 1993).

Finally, after Stewart made the improper comment, the trial court explained the situation to the jurors, questioned them as to whether they could proceed fairly, and determined that any harm had been cured. The trial court was in the best position to make this determination. See Boney, 880 N.E.2d at 291; Smith, 872 N.E.2d at 176. Moreover, "a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement." Agilera v. State, 862 N.E.2d 298, 308 (Ind. Ct. App. 2007), trans. denied; see also Bradley v. State, 649 N.E.2d 100, 108 (Ind. 1995) ("[R]eversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings."). Here, the trial court did more than merely admonish the jury to disregard Stewart's statement, as it also affirmatively told the jury that no evidence indicated that charges or complaints had ever been filed against Barnes for similar misconduct. Under these circumstances, we conclude that the trial court's admonishment cured any error, and its denial of Barnes's motion for a mistrial was not an abuse of discretion. See Frentz v. State, 875 N.E.2d 453, 466 (Ind. Ct. App. 2007) (concluding that any error in the prosecutor's statements was cured by the trial court's admonishment), trans. denied; Agilera, 862 N.E.2d at 308 (trial court did not abuse its discretion in denying defendant's motion for a mistrial after admonishing the jury to disregard witness's improper statement).

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conformity with."

II. Sufficiency of the Evidence

A. Standard of Review

When reviewing a claim of insufficient evidence, we will not reweigh evidence or judge witnesses' credibility. Grim v. State, 797 N.E.2d 825, 830 (Ind. Ct. App. 2003). We will consider only the evidence favorable to the judgment and the reasonable inferences drawn therefrom. Id. We will affirm a conviction if the lower court's finding is supported by substantial evidence of probative value. Id.

Our supreme court has recently summarized our standard of review when assessing claims of insufficient evidence.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted) (emphasis in original).

B. Evidence Supporting Barnes's Conviction

Barnes points out that the evidence against him (except the testimony of Stewart indicating that Barnes admitted harming Deneja) is largely circumstantial. However,

convictions may be based on purely circumstantial evidence, and such evidence "need not exclude every reasonable hypothesis of innocence." Hampton v. State, 873 N.E.2d 1074, 1079 (Ind. Ct. App. 2007). "It is enough if an inference reasonably tending to support the verdict can be drawn from the circumstantial evidence." Id.

The evidence favorable to the verdict indicates that Deneja had no injuries when Jimmy left her with Barnes, and that five minutes after Barnes was left alone (except for three children ages five and under) with Deneja, he called 911 to report Deneja's injuries. Doctor Yount testified that blood would have started coming out of Deneja's ear "[c]ertainly within two minutes, probably within seconds" of the blows. Tr. at 279. As thorough searches of Jimmy's vehicle and the areas surrounding the apartment revealed no blood, it was a reasonable inference that the injuries were inflicted in the apartment, at a time when Barnes was the only person present except for three children ages five and under.

We recognize that mere presence at the scene of a crime, standing alone, will not support a conviction. Roop v. State, 730 N.E.2d 1267, 1271 (Ind. 2000). However, such presence along with other circumstances may be sufficient. Id. Here, Barnes had the opportunity to commit this crime, and the evidence permits the reasonable inference that the crime happened at a time when he was the only person with such opportunity. A reasonable inference taken from these circumstances is that Barnes caused the injuries. See Woodrum v. State, 498 N.E.2d 1318, 1323-24 (Ind. Ct. App. 1986) (concluding sufficient evidence existed to support conviction for reckless homicide where witness testified she left victim in good health with defendant, who had sole opportunity to inflict injuries). This inference is

not inescapable, but it need not be based on our standard of review. We conclude sufficient evidence supports Barnes's conviction.

III. Sentencing[3]

At the sentencing hearing, the trial court made the following statement explaining his decision to sentence Barnes to forty-eight years incarceration.

> First of all, I think no one would suggest that this crime was a crime that was premeditated, thought out, planned, or anything of that sort. . . . Actually the circumstances under which it arose were circumstances that were somewhat – certainly unplanned because the person that was supposed to be there was not at the moment there to act as the temporary baby-sitter for the kids.
> ***
> I would have to characterize it from the doctors' testimony that there was – and I guess the phrase would have to come to mind and does come to my mind explosive rage. It was explosive and it had to be rage. It was not an accident. . . .
> . . . [A doctor] did testify that [the skull fractures] could not have happened in . . . one impact . . . there had to be more than one impact. . . .
> The second thing I note was that the doctor said that the force was extremely powerful to create the fractures and that the results would have been instantaneous within seconds of the blows.
> ***
> . . . [I]t was a very young baby even if it was fifteen months. The statutory time line is a child under fourteen years of age. And this certainly was a very, very helpless infant. . . .
> I think the mother has noted the loss of this child albeit such a young child as being felt by her siblings and the witness who spoke, the mother. It is having a profound impact on the family, and I note that.
> I have to note that Mr. Barnes – although it wasn't planned that he be, he

[3] We note that Barnes has not provided this court with a copy of the pre-sentence report in his appendix. Barnes's failure to include this report has somewhat hindered our review of his sentence, as such a report is inherently important to our analysis of the sentence's appropriateness. See Perry v. State, 845 N.E.2d 1093, 1094 n. 2 (Ind. Ct. App. 2006) ("[T]he presentence report is a vital document that should be included in the appendix in any appeal that raises sentencing issues."), trans. denied; Ind. Appellate Rule 50(B)(1)(d) (an appellant's appendix should include any excerpts from the record "that are important to a consideration of the issues raised on appeal"). We also note that the State could have filed an appendix including this presentence report. See Niemeyer v. State, 865 N.E.2d 674, 676 (Ind. Ct. App. 2007) (citing Ind. Appellate Rule 50(B)(2)).

> accepted that he would be de facto the person having the care and custody of the children. . . .
> ***
> I will note that [Barnes] has a supportive family . . . . He himself personally did have a work history.
> . . . [A]nd he was a member of the Baptist church. Having said that, I have to note . . . he did have a criminal history which is disturbing indeed. Two crimes of violence albeit misdemeanor batteries, a . . . theft case that was treated as a misdemeanor. . . . There was another theft case where the defendant got an eighteen month suspended sentence and had a pending probation of eighteen months at the time of this offense. . . .
> . . . But there was a pending charge that allegedly occurred about six weeks after this offense, allegedly occurred, and that is Possession of Cocaine . . . .
> ***
> . . . But I have to note that given the nature of that very terrible five minues or so to give fifty years for that I think is – the Supreme Court in cases have said they are reserved for the worst of the worst. I can't imagine anything worse in terms of the loss of a child for the mother and the family than the loss of this child of course. But as to the offender and the crime itself – and even the defendant himself as a person – I cannot say that this is within that category of what the Supreme Court said.
> . . . And maybe it's only symbolic but I am saying it is severe. It was severe, but it is not the worst of the worst. . . .

Tr. at 26-34.

A. Standard of Review

"Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution 'authorize independent appellate review and revision of a sentence imposed by the trial court.'" Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)), clarified on reh'g, 875 N.E.2d 218. When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the

offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the [presumptive or advisory] sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress, 848 N.E.2d at 1080.

B. Appropriateness of Barnes's Sentence

1. Nature of the Offense

Barnes inflicted multiple forceful injuries on a helpless fifteen-month-old left in his care. Barnes makes little argument regarding the nature of the offense, likely because of its heinous and brutal nature. See Hightower v. State, 422 N.E.2d 1194, 1197 (Ind. 1981) (affirming a sentence above the presumptive based on the trial court's aggravating circumstance that the crime was "particularly and exceptionally brutal in its nature"); Roney, 872 N.E.2d at 207 (noting the brutal nature of the offense in concluding a maximum sentence for murder was not inappropriate); cf. Gauvin v. State, 883 N.E.2d 99, 105 (Ind. 2008) (affirming a sentence of life without parole for the defendant's murder of her child and describing the offenses as "heinous and cruel").

We recognize that the victim's age is an element of the offense. See Ind. Code § 35-42-2-1(a)(5) (battery is a Class A felony if it "results in the death of a person less than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age"). However, the victim in this case was only 15 months old, well below the threshold requirement of the statute. As the trial court recognized, the victim was completely helpless to defend herself from Barnes's attack. Under these circumstances, the young age of the victim makes Barnes's offense more egregious than a typical battery resulting in death. Cf. Sullivan v. State, 836 N.E.2d 1031, 1035 (Ind. Ct. App. 2005) (trial court properly found aggravating circumstance where the trial court recognized that victim's age was element of child molesting, but fact that victim was eight years old made the crime "more heinous"); Kien v. State, 782 N.E.2d 398, 414 (Ind. Ct. App. 2003) (trial court properly considered victim's age where trial court "specifically noted that a four or five-year-old child is extremely vulnerable to sexual predation because of her 'tender years.'"), trans. denied.

Further, Barnes was in a position of control over the victim at the time he committed the offense. This factor further distinguishes his offense from a typical battery resulting in death. Cf. Ind. Code § 35-38-1-7.1(a)(8) (trial court may consider as an aggravating circumstance that the defendant "was in a position having care, custody, or control of the victim of the offense"); Rodriguez v. State, 868 N.E.2d 551, 555 (Ind. Ct. App. 2007) (concluding trial court properly found defendant's position of trust to be an aggravating circumstance where the child victim's mother lived with defendant, and victim's visitation took place in defendant's home).

2. Character of the Offender

In regard to Barnes's character, we initially observe that he apparently has a prior felony conviction of theft, and three prior misdemeanor convictions, one of theft and two of battery. Although this criminal history is not the worst we have seen, neither is it insignificant or unrelated, as it consists of a felony and two misdemeanors that involve violence against others. See Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006) (recognizing that the weight of a defendant's criminal history "is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability.").

In addition to his criminal history, Barnes committed the instant offense while on probation, further evidencing his lack of respect for the criminal justice system and the failure of attempts at rehabilitation outside of incarceration. Cf. Ryle v. State, 842 N.E.2d 320, 323 n.5 (Ind. 2005) (recognizing that violation of probation and criminal history are separate aggravators, as "probation further aggravates a subsequent crime because the defendant was still serving court-imposed sentence"), cert. denied, 127 S.Ct. 90 (2006).

In sum, we conclude Barnes has failed to persuade this court that his forty-eight year sentence is inappropriate given the nature of his offense and his character.

Conclusion

We conclude the trial court acted within its discretion in denying Barnes's motion for a mistrial, sufficient evidence supports Barnes's conviction, and his sentence is not

inappropriate given the nature of the offense and his character.

Affirmed.

BAKER, C.J., and RILEY, J., concur.